IN THE MATTER OF ARBITRATION **GRIEVANCE ARBITRATION**

between

Mark Johnson - Discharge

Metropolitan Council **Grievance**

-and -

BMS Case No. 06-PA-381

International Association of Machinists and Aerospace Workers, District Lodge No. 77 **April 24, 2006**

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APPEARANCES

For Metropolitan Council

Frank J. Madden, Attorney, Frank Madden & Associates, Plymouth, Minnesota
Susan K. Hansen, Attorney, Frank Madden & Associates, Plymouth, Minnesota
Michael Atkinson, Atkinson Investigations
James Schmidt, Maintenance Manager, Environmental Services
William G. Moore, General Manager, Environmental Services
Lynn Schneider, Administrative Manager, Environmental Services
Union Bargaining Unit Members #1-6

For International Association of Machinists and Aerospace Workers, District Lodge No. 77

Gary T. Schmidt, Directing Business Representative
Mark Johnson, Grievant

JURISDICTION OF ARBITRATOR

Article 17, Grievance Procedure, Section 17.04, Procedures, of the 2003-2006 Collective Bargaining Agreement (Joint Exhibit #1) between Metropolitan Council (hereinafter referred to as the

"Metropolitan Council", "Council", or "Employer") and International Association of Machinists and Aerospace Workers, District Lodge No. 77 (hereinafter referred to as the "Union") provides for an appeal to arbitration of properly processed grievances.

The Arbitrator, Richard John Miller, was selected by the Employer and the Union (collectively referred to as the "Parties") from a panel submitted by the Minnesota Bureau of Mediation Services ("BMS"). A hearing in the matter convened on February 9 and March 23, 2006, at 9:00 a.m. at the BMS Offices, 1380 Energy Lane, Suite 2, St. Paul, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his records. The Parties were afforded full opportunity to present evidence and arguments in support of their respective positions. The Parties filed post hearing briefs which were received by the Arbitrator on April 17, 2006, after which the record was considered closed.

The Parties agreed that the grievance was properly before the Arbitrator for decision.

ISSUES AS STIPULATED TO BY THE PARTIES

Did the Employer violate the terms of its May 16, 2005 Return to Work Last Chance Agreement with the Union and Grievant Mark Johnson when it terminated the Grievant on August 27, 2005?

STATEMENT OF THE FACTS

The Employer manages the Twin Cities metropolitan area wastewater treatment and mass transportation systems. The Grievant, Mark Johnson, is employed as a Machinist by Metropolitan Council, Environmental Services, which encompasses the wastewater treatment metro plant, 2400 Childs Road, St. Paul, Minnesota.

The Grievant has an extensive history of misconduct which has resulted in the following disciplinary action:

1. On March 14, 2000, a documented coaching/counseling session occurred for the Grievant's attendance and behavioral problems. This was summarized in a memorandum from the Office of Diversity. Jim Schmidt, Maintenance Manager, had received reports from the General Leads and Lead Machinists of the Grievant's intimidating and challenging behavior in the workplace. The Grievant was informed in writing that interacting with co-workers in an intimidating, impatient and challenging manner was unacceptable. (Employer Exhibit #23). The Grievant testified that he was on notice of the Council's expectations of his behavior in the workplace.

2. On June 14, 2004, the Grievant was issued a letter from Jim Schmidt summarizing management's concerns regarding his performance and attendance problems. (Employer Exhibit #24).

3. On September 20, 2004, the Grievant was issued a formal written reprimand for falsifying a document in an attempt to justify an unauthorized absence from work. (Employer Exhibit #25). The Grievant tore away the dates from a Firestone Tire & Service Center receipt in an effort to claim he was at Firestone on a date that he was absent from work. (Employer Exhibit #26). Despite the fact that Council Policy provides for immediate discharge

for falsification, the Council provided the Grievant with another chance for this admitted serious offense.

4. On December 2, 2004, the Grievant was placed on a one day decision making leave for falsifying information when entering his time on the time clock and submitting false medical information. A decision making leave is the final stage of discipline before discharge. The Grievant was specifically informed that "any further lapses in performance or violation of Council policy, irrespective of its nature or severity, within 18 months of this action, will result in further discipline, up to and including termination of your employment." (Employer Exhibit #27).

5. After the Grievant's decision making leave, he indicated that he wanted to return to work. Therefore, on December 6, 2004, the Council, Union and Grievant agreed to a Return to Work Last Chance Agreement. The terms included the use of annual leave and conditions regarding attendance. The Agreement also provided "these conditions shall not operate to restrict the Council's authority to discipline up to and including discharge Mr. Johnson for any reason not mentioned, if that reason would have been a proper reason for his discipline or discharge." (Employer Exhibit #28). The Grievant was specifically placed on notice of the expectations he would have to meet in order to maintain his employment with the Council. The Grievant testified that he understood that he was given another chance with this Last Chance Agreement, and he needed to be careful and not engage in future misconduct.

6. On April 28, 2005, the Grievant was issued a notice of the Council's intent to terminate his employment based on the loss of his CDL license (Employer Exhibit #31), his failure to notify the Council of the loss of his license and his overall record of employment. (Employer Exhibit #29). The notice of intent to terminate reiterated the fact that the Grievant was on a Last Chance Agreement at the time of the loss of his CDL. Id. The Grievant testified that he understood this was serious. William G. Moore, General Manager, met with the Union and the Grievant in a pre-termination meeting. Mr. Moore concluded that despite the fact that the Council had grounds to terminate the Grievant's employment, the Grievant would be given one more chance.

7. In lieu of terminating the Grievant's employment, on May 16, 2005, the Employer, Grievant and Union agreed to a second Return to Work Last Chance Agreement. (Employer Exhibit #30). The conditions agreed to included use of annual leave and conditions regarding attendance. The Agreement also provided the following notice:

> 6. Mr. Johnson will be on notice that any future conduct, performance or attendance problem will result in future discipline up to and including termination of employment.

Id. During the May 16, 2005 meeting regarding the Last Chance Agreement, Mr. Moore was clear with the Grievant that any other violation of Council policy or problem would result in his termination. The Grievant did not claim he did not understand this. The Grievant admitted that he understood that he was being given one more chance and that any violation of Council Policies would constitute grounds for his discharge.

The Parties stipulated that the Grievant's co-workers, fellow Bargaining Unit Members, who testified on behalf of the Council would be referred to as Employee #1 through #6 in the Arbitrator's decision based on the order in which they appeared before the Arbitrator.

On July 13, 2005, Bargaining Unit Employee #1, one of the Grievant’s co-worker, filed a written complaint against the Grievant for driving a motorized cart at him, attempting to hit him with the lunchroom door, bumping and pushing him and the Grievant's unsafe driving habits. (Employer Exhibit #20).

The Metropolitan Council utilized the services of independent investigator Michael Atkinson to investigate the

complaint. Mr. Atkinson has more than 35 years of experience conducting investigations. He has conducted more than 30 employment investigations for the Hennepin County Attorney's Office on issues related to harassment and workplace behavior. He has taught courses related to investigation, interrogation, interview techniques and report writing for the BCA and Metropolitan State University. He was asked by the Council to conduct a fair and thorough investigation, and the Council did not have a preconceived notion of the outcome of the investigation.

The Grievant was placed on a paid administrative leave pending the outcome of the investigation. The investigation consisted of tape-recorded and transcribed interviews of Employee #1, in addition to nine other employees who work at Metropolitan Council Environmental Services. (Employer Exhibits #3-10 and #12-13). The Grievant was interviewed in the presence of Union Steward William Picha. (Employer Exhibit #11). Mr. Atkinson also inspected the locker room and the lunchroom door as part of the investigation and had photographs taken of these areas in the Plant. (Employer Exhibits #14-19).

Mr. Atkinson concluded that the evidence gathered during the course of the investigation substantiated that the Grievant's

behavior created workplace safety issues, it was largely intentional, and it could incite physical altercations between him and other employees. (Employer Exhibits #1-2). Mr. Atkinson specifically concluded from his investigation that the Grievant engaged in the following behavior:

- The Grievant attempted to hit Employee #1 with the lunchroom door by stiff-arming the door at him and just missing his head in mid July 2005.
- The Grievant drove a motorized cart at Employee #1 in early July 2005, and the cart brushed Employee #1's pant leg.
- The Grievant bumped into Employee #1 with his shoulder, elbow and bags he was carrying.
- The Grievant tripped and pinched Employee #3.
- In the locker room, the Grievant placed his naked ******** and ******** within approximately 6-20 inches of Employee #2's face. The Grievant laughed when he did this and made comments to Employee #2 such as, "come on back," "I've got something for you."
- The Grievant drove his vehicle in an unsafe manner on the entrance road to the plant.

(Employer Exhibits #1-2). Mr. Moore reviewed the investigation materials and considered the evidence regarding the Grievant's conduct. Mr. Moore consulted with representatives from Human Resources and the Office of Diversity in addition to key managers from Environmental Services. A unanimous decision was reached to

issue the Grievant a notice of the Council's intent to terminate his employment on August 19, 2005, based on intimidating and inappropriate behavior in violation of Council policies 4-6-1, Workplace Violence Prevention, and 4-9 Safety and Health, a violation of the 2005 Last Chance Agreement and his history of unacceptable conduct. (Joint Exhibit #2; Employer Exhibits #21-22.) After providing the Union and the Grievant with an opportunity in a pre-termination meeting on August 23, 2005, to further respond to the allegations, the Council terminated the Grievant's employment effective August 27, 2005. (Joint Exhibit #3).

On August 29, 2005, Union Directing Business Representative Gary Schmidt, on behalf of the Grievant, filed a written grievance protesting the Grievant's termination. (Joint Exhibit #4). The grievance was denied by Mr. Moore on October 3, 2005. (Joint Exhibit #5). Gary Schmidt informed Mr. Moore by letter dated October 6, 2005, that the Union wanted to advance the grievance to arbitration, the next step in the contractual grievance procedure. (Joint Exhibit #6). The grievance was then processed to arbitration. (Joint Exhibits #7- 8).

UNION POSITION

The Employer violated the Contract when it discharged the Grievant without just cause. The Grievant's discipline was too

severe. "Willful misconduct" of an employee means more than mere negligence. The Grievant did not willfully, deliberately, or with any evil design or wrongful intent violate the Employer's policies, procedures or violate the Grievant's Last Chance Agreement in an attempt to cause physical harm to others or to demonstrate intimidating or unacceptable behavior toward his fellow employees. The Grievant did not attempt to discredit, humiliate, or purposely harm a co-worker. He never deliberately attempted to injure or place a co-worker in harm's way or make their environment one of a hostile nature.

The Employer has greatly exaggerated the facts, and the witnesses have speculated on an unfounded environment that would exist with the return of the Grievant. The issue now and only now has completely and fully been addressed. All parties now know what has happened. The alleged acts committed by the Grievant were unintentional and/or a form of camaraderie within the work group.

The elevating to a discharge should have never taken place if all parties and witnesses had openly informed each other of the unwelcome situations that were taking place. Instead of correcting the situation at an earlier time, the Employer chose to investigate instead of educate, and now the Grievant suffers

the loss of his employment. Although several issues arose in the work career of the Grievant, he was either cleared of any wrongdoing or was disciplined in some fashion. The Grievant should not be disciplined again for the same infractions, which is the intent of the Employer, by raising his misconduct again in this proceeding. The prior discipline imposed upon the Grievant should not be a factor in the outcome of whether there was just cause to terminate the Grievant.

The Union, therefore, submits that on the basis of the entire evidence in this case, the Union's position should be fully sustained; the Employer found guilty of a Collective Bargaining Agreement violation, and that the settlement requested be awarded in favor of the Union.

E**MPLOYER POSITION**

This is one of the most important grievance arbitration proceedings in the history of the Metropolitan Council Environmental Services. It is one of the worst cases of egregious employee misconduct by an employee with a lengthy discipline

record. The Grievant has engaged in intimidating, inappropriate and unsafe behavior in the workplace in violation of Council Policies 4-6-1 and 4-9. The Grievant's violation of the Policies constitute grounds for his discharge based on the terms of the 2005 Last Chance Agreement. Any violation of Council Policy subsequent to the 2005 Last Chance Agreement constitute grounds for the Grievant's discharge. The conduct exhibited by the Grievant cannot be tolerated, and the Council should not be required to continue to employ him as a Machinist. The Grievant's conduct was so egregious that his discharge from employment at the Council must be upheld. The Grievant's co-workers remain fearful of the Grievant and afraid of retaliation from him. The Council has an obligation to address such behavior. There is no room in the Council's workforce for the intimidating, harassing and unsafe behavior demonstrated by the Grievant.

No amount of progressive discipline has been successful with the Grievant. Most employers would not have given an employee as many chances as the Council has provided to the Grievant. The totality of

the Grievant's conduct including the egregiousness of his actions, his violation of the 2005 Last Chance Agreement and his extensive record of discipline justify his termination from employment. There is absence in the record any reason justifying a further last chance for the Grievant. Thus, the termination of the Grievant should be upheld by the Arbitrator.

For all of the foregoing reasons, the Council requests that the Arbitrator find there was just cause for the discharge of the Grievant and deny the grievance in its entirety.

ANALYSIS OF THE EVIDENCE

The record establishes that the Grievant is the recipient of two Return to Work Last Chance Agreements. The first Last Chance Agreement was entered into by the Grievant, Union and Council on December 6, 2004, due to his falsification of a document in an attempt to justify an unauthorized absence from work and his ongoing attendance problems. The Agreement provided the Council with the authority to discipline the Grievant up to and including discharge for any future misconduct.

The Grievant committed misconduct by the loss of his CDL in the spring of 2005, and failure to notify the Council of the suspension of his CDL. This led the Council to issue the Grievant a notice of intent to terminate his employment on April 28, 2005. The Employer, however, decided to give the Grievant another chance by agreeing with the Grievant and Union to a second Return to Work Last Chance Agreement on May 16, 2005. The 2005 Last Chance Agreement placed the Grievant "...on notice that any future conduct, performance or attendance problem will result in future discipline up to and including termination of employment." (Employer Exhibit #30). This provided the Grievant with another opportunity to retain his employment with the Council.

One goal of a last chance agreement is to rehabilitate an employee, an arrangement which is in the interest of the union and employer as well as the employee. The last chance agreement provides an opportunity for the union to save a job for a member and the employer may be able to keep an employee who has special skills and could not be easily replaced. A successful last chance agreement is one whose shock value will sufficiently rehabilitate the errant employee.

Article 13, Disciplinary Procedures, Section 13.01, Right to Discipline, of the Collective Bargaining Agreement states that "[t]he Employer shall have the right to impose disciplinary actions on employees for just cause." Section

13.02, Disciplinary Actions, provide that "[d]isciplinary actions by the Employer shall include only the following: Oral Reminder, Written Reminder, Decision-Making Leave, Crisis Suspension, and Discharge." An employee's discharge under a last chance agreement has a narrower scope of review by the arbitrator than under a normal just or proper cause discharge because the employee has already been discharged and, by agreement of the parties, is given a second opportunity to prove that the original discharge was not warranted.

The Arbitrator is bound by the specific terms and conditions set forth by the Grievant, Union and Employer as contained in the 2005 Last Chance Agreement. The Arbitrator cannot venture outside the terms and conditions of the 2005 Last Chance Agreement to apply the "law of the shop" as would be a valid consideration in a normal just cause discharge under Article 13 of the Collective Bargaining Agreement. Tootsie Roll Industries v. Local Union 1, 832 F.2d 81 (7th Cir. Ct., 1987); Independent Steel Workers Alliance and Keystone Steel & Wire Company, 88-1CCH ARB 8273 (1988); Northwest Airlines v. International Ass'n., 894 F.2d 998 (8th Cir. 1990).

The Employer has an obligation to provide employees with a safe work environment free of violence in addition to the requirements of Minn. Stat. Section 15.86 mandating a goal of zero tolerance of violence in the workplace. Consequently, the Metropolitan Council has adopted policies relative to violence and safety in the workplace as follows:

Policy 4-6-1, Workplace Violence Prevention

> It is the policy of the Metropolitan Council to minimize or eliminate foreseeable threats or acts of violence to which any employee may be subjected. Incidents of work related threats or acts of violence will be treated seriously, promptly investigated and acted upon.
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> * * *
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> Violence is defined as the abusive or unjust exercise of power, intimidation, harassment and/or the threatening or actual use of force which results in or has a reasonable likelihood of causing hurt, fear, injury, suffering or death.

(Employer Exhibit #21).

Policy 4-9 Safety and Health

> The Metropolitan Council is committed to protecting the safety and health of employees…… The staff are expected to identify and follow sound risk control principles.

Employer Exhibit #22). Thus, the lingering issue before the Arbitrator is whether the Grievant violated the terms and conditions of the 2005 Last Chance Agreement by engaging in inappropriate, intimidating, harassing and unsafe behavior in the workplace toward his co-workers in violation of Council Policies 4-6-1 and 4-9.

The assessment of the credibility of witnesses is important to the outcome of this case. Central to this case lies the widely differing versions of what exactly transpired between the Grievant and his co-workers, who testified against the Grievant. The Grievant claims that all of the co-workers who testified

against him were liars. As a result, it will be necessary for the Arbitrator to evaluate witness testimony for credibility, carefully weighing both intrinsic validity and external probability. Witnesses are capable of deceit, distortion, and even trying to fashion events in order to put their best foot forward. The Arbitrator must carefully evaluate the testimony and evidence in this case in establishing what in fact happened, if anything, between the Grievant and his co-workers in the workplace in 2005. Employee #1 alleges that the Grievant attempted to hit him with the lunchroom door by stiff-arming the door at him and just missing his head in mid-July 2005. The lunchroom door at the Metropolitan Council Environmental Services plant is a steel fire proof door weighing 100 to 120 pounds with a 24 inch by 36 inch glass window. The door opens out into the plant hallway and is surrounded by other doors. (Employer Exhibits #14, 19).

In mid-July 2005, Employee #1 alleges that he was walking into the lunchroom from the hallway. As he was reaching for the pull handle on the door, he saw the Grievant on the other side of the door and the two established eye contact through the glass window. Employee #1 stated the Grievant "stiff armed" the door and the door opened fast with a blur. Employee #1 believed he was lucky to get his head out of the way of the door and escape

injury from the door. If the door had hit his head, it would have cut his head open. Employee #1 believed the Grievant's actions of stiff arming the lunchroom door were intentional based on the fact that Employee #1 and the Grievant had eye contact with one another and the Grievant knew Employee #1 was on the other side of the door. Employee #1 testified that there is no way this could have been an accident.

The Grievant acknowledged that attempting to hit a co-worker with the lunchroom door would constitute a serious offense, it could be threatening, someone could be injured and it would be wrong. The Union argued that there are two doors to the lunchroom and they are not labeled "in" or "out." The Union also focused on the location of the lunchroom door in relation to the location of the shop door, which do not align with each other. The Grievant testified that on one occasion he may have opened the door too quickly, and a near miss with another employee did in fact happen. The Grievant claims that he delivered an apology to that employee (which was not identified by the Grievant), and the situation did not surface again. The Grievant testified that when employees leave from inside the lunchroom, including himself, they have left the lunchroom with their hands full of items, and do open the lunchroom door with their foot, elbow or possibly by backing into the door. In those cases the Grievant claims that the possibility could exist of opening the door into a co-worker.

The Grievant's arguments do not negate Employee #1's unequivocal testimony that he and the Grievant had eye contact with one another and the Grievant knew Employee #1 was on the other side of the door. Furthermore, there is no evidence that the claimed apology by the Grievant to an unnamed co-worker involved the incident with Employee #1. This was not an accident caused by the Grievant having his hands full of items forcing him to kick open the door with his foot, elbow or backing into the door. The Grievant's actions also are not attributable to the labeling or location of the lunchroom door.

The Grievant's actions in this regard constitute violations of Council Policies 4-6-1 and 4-9.

Employee #1 also alleges that the Grievant intentionally drove a motorized cart at him, and the cart brushed Employee #1's pant leg. Specifically, in early July 2005, Employee #1 alleges that he was standing at the tool crib window talking to Employee #4, and the Grievant was nearby on his three wheel Cushman cart which weighs approximately 1,000 pounds. Employee #1 heard the engine "rev" as the Grievant pushed the throttle on the Cushman cart. The Grievant drove the cart toward Employee #1, did a "u" turn right by him and Employee #1 felt the cart brush his pant leg. Employee #1 believed the Grievant's actions were intentional based on the fact that there was sufficient room for

the Grievant to turn the cart around without coming so close to Employee #1. Employee #1 believed that his leg would have been broken had the Grievant hit him with the cart.

The Grievant testified that he did not intentionally brush the pant leg of Employee #1. The Grievant stated that the tool crib area is a small area in which employees drive their carts up to and return tools. This area is confined space which makes it very difficult to pass other employees without getting close to them.

There is not enough substantial evidence one way or another to prove that the Grievant intentionally brushed the pant leg of Employee #1 while driving his cart. It could have simply been an accident.

Employee #1 further alleges that the Grievant bumped him with his shoulder, elbow and bags on a daily basis within the last two years. This occurred by the tool crib window, in the hallway by the time clock, while he was walking through the shop and during break in the lunchroom.

Employee #1 believed the Grievant's actions were intentional and not accidental because the aisles in the shop and the plant areas where the Grievant bumped are sufficiently wide so that the Grievant's physical contact with Employee #1 was not necessary.

Employee #1 believes that the Grievant went out of his way to have contact with him and bump into him. Employee #1 also testified that the Grievant is a muscular, physically fit person who lifts weights and is not clumsy on his feet.

The Grievant testified that bumping a co-worker would be inappropriate if it was done intentionally or in a malicious way. The Grievant admitted bumping into Employee #1 but claimed this was accidental.

The facts do not support the Grievant's claim that this was an accident. The Grievant never said "excuse me," "pardon me" or apologized to Employee #1 as one would expect an employee to do if he accidentally bumped into a co-worker. Moreover, the Grievant's admitted pattern of giving co-workers a "shot with his elbow," giving co-workers a "shot with his shoulder," "stepping on their steps," "kicking the bottom of their steps," "putting a leg out," pinching and tripping co-workers (Employer Exhibit #11, p. 9) was merely an extension of purposely bumping into Employee #1.

The Grievant admitted that he engaged in this behavior intentionally on a daily basis with his co-workers and that someone could stumble, fall or be injured, but the Grievant characterized this as "horseplay." (Employer Exhibit #11).

Conduct which could result in injury is not "horseplay." This conduct is not typical among all employees. The Grievant's admissions that he has engaged in this conduct constitute admissions of violation of Council Policies 4-6-1 and 4-9.

Employee #2 testified that on more than 20 occasions, the Grievant placed his naked ******** and ******** approximately 6-20 inches from Employee #2's face. This occurred in 2005 and as recently as July 2005. Employee #2 felt bullied and harassed. He tried to avoid the Grievant and his harassing actions in the locker room by waiting for five to ten minutes before going into the locker room. He did not observe any other employees engage in similar conduct or do what the Grievant did to him. He was a probationary employee until approximately June 2005 and did not make a complaint because he did not want to "start trouble as the new guy."

Employee #2 testified that he is positive the Grievant was intentionally placing his naked ******** and ******** near his face. The Grievant angled his naked ******** toward Employee #2. Employee #2 told the Grievant at least ten times to stop. He said, "knock it off," "move over," "give me more space," and "that's enough of that." The Grievant did not stop, his actions continued and he laughed when Employee #2 told him to stop. The

Grievant also made taunting comments to him such as "where have you been," "come on back," and "I've been waiting for you."

Employee #3 testified that over the course of a number of weeks during the summer of 2005, he saw the Grievant "back into" Employee #2's face, and the Grievant's naked ******** and ******** were within six to eight inches of Employee #2's face. Employee #3 heard Employee #2 tell the Grievant "stop it" and ask the Grievant "what's wrong with you?" Employee #3 stated that the Grievant taunted Employee #2, he laughed in response to Employee #2's statements and made comments like "I've been waiting for you" or "I've got something for you." The Grievant waited for Employee #2 in the locker room and Employee #3 believed the Grievant's actions were intentional. Employee #3 has not observed any other employee engage in similar conduct. (Employer Exhibit #4, pp. 9-11).

The Grievant denied engaging in this conduct. He testified that on only one occasion, Employee #2 told him that his **** was in Employee #2's face and the Grievant said he was sorry. The Grievant pointed out that when twenty to fifty male employees interact while undressing for a shower or return to dress from the shower, uncomfortable situations could take place like putting your **** and ******** near a co-worker. The Grievant

claims that to alleviate this unpleasant situation of having to shower and dress near other co-workers in tight quarters, joking and playful discussion sometimes takes place. The Grievant, however, stated that when this uncomfortable situation was addressed to him, he made a conscious effort to safeguard against a recurrence.

Contrary to the Grievant's claim, the evidence proves that the Grievant intentionally placed his naked ******** and ******** near Employee #2's face on multiple occasions. The Grievant had amble space to avoid this interaction with Employee #2. He had five 12 inch wide lockers providing him with five feet of space in which to maneuver and dress. The Grievant did not avail himself of that opportunity.

This was intentional conduct on the Grievant's part, and not inadvertent, due to the taunting comments the Grievant made to Employee #2 and the number of times it occurred. The Grievant's angling of his ******** toward Employee #2, the Grievant's comments to him and the fact the Grievant continued to engage in this behavior after he told him to stop on several occasions is convincing evidence that the Grievant was doing this intentionally to Employee #2.

Employee #2 was rightfully embarrassed by the Grievant's actions. Common sense would dictate that if a locker room

presents close quarters, a co-worker would stand, sit, move or wait when appropriate to show respect to a fellow co-worker. The Grievant instead displayed his ******** and ******** in the locker room to intimidate, embarrass and exercise control over Employee #2.

Employee #2 had a justifiable reason to not report this conduct himself because, as a probationary employee, he was unsure how complaining about another employee would be viewed by co-workers.

The Grievant's actions in the locker room constitute violations of Council Policies 4-6-1 and 4-9.

Employee #1 testified that the Grievant frequently drove 60 to 70 mph on the entrance road to the Plant despite the posted speed limit of 40 mph. The Grievant swerved in front of Employee #1 and his wife and cut them off as they were driving, and he feared for her safety.

Employee #1's testimony is also similar to Employee #3's observations of the Grievant's driving. Employee #3 testified that in the summer of 2005, he was driving a Cushman cart on a Plant road and the Grievant was driving a truck on the same road. The two had eye contact and the Grievant almost ran him off the road. Employee #3 believed this conduct was intentional on the

Grievant's part because he was laughing as he veered toward Employee #3.

While it is true that the Grievant's driving record includes the April 2005 suspension of his license for five citations of speeding, illegal change of course and following too close over a 24 month period, this is not substantial proof that the Grievant intentionally cutoff Employee #1 or intentionally ran Employee #3 off the road. There in not sufficient evidence to support a finding that the Grievant's acts were intentional in these regards.

The criteria in which to judge the discharge of the Grievant under the 2005 Last Chance Agreement is simply whether the Grievant violated the terms and conditions of said Agreement. The Grievant, who agreed to be bound by the 2005 Last Chance Agreement, acknowledged that the Council was giving him one more chance to retain his employment based on that Agreement. The Grievant understood the language contained in the 2005 Last Chance Agreement that "...any future conduct, performance or attendance problems..." applied to any Council Policy, including safety policies, and he testified specifically that any violation of Council Policy subsequent to the 2005 Last Chance Agreement constituted grounds for the termination of his employment. Thus,

the Grievant acknowledges that he is not to be judged by the same just cause standard as other employees who may commit performance or attendance problems and given whatever leniency might have been given to other employees. The Grievant is required to "strictly toe the line" and if discharged, can only challenge whether the Employer acted in an improper manner. Thus, the Employer's actions in applying the terms and conditions of the 2005 Last Chance Agreement cannot be arbitrary, capricious or discriminatory. In other words, the Employer's actions must be fair and equitable as applied to the terms and conditions of the 2005 Last Chance Agreement. The evidence establishes that the Grievant engaged in attempting to hit Employee #1 with the lunchroom door by stiff-arming the door at him and just missing his head in mid-July 2005. The Grievant is also guilty of bumping into Employee #1 with his shoulder, elbow and bags he was carrying. He also tripped, elbowed, pinched and bumped other co-workers. In the locker room, the Grievant placed his naked ******** and ******** within approximately 6-20 inches of Employee #2's face. The Grievant laughed when he did this and made demeaning comments to Employee #2.

The overwhelming evidence proves that the Grievant engaged in inappropriate, intimidating, unsafe and harassing behavior in the workplace that could have resulted in employee injuries. He bullied and victimized co-workers. This conduct on the part of the Grievant violates Council Policies 4-6-1 and 4-9. His conduct violated the 2005 Last Chance Agreement which prohibited him from any future conduct including performance problems.

The Grievant has an extensive history of misconduct which has resulted in disciplinary action. The Grievant claimed that Mr. Moore told him at the May 16, 2005 meeting, which ultimately resulted in the formulation of the 2005 Last Chance Agreement, that he had a "clean slate" with regard to his previous disciplines. Administrative Manager Lynn Schneider was present at the meeting and she testified unequivocally that Mr. Moore did not say the Grievant had a clean slate. The Grievant's March 14, 2000 documented coaching/counseling session references the fact that as of that date, the Grievant was "starting with a clean slate." (Employer Exhibit #23). As a result, the Council has not submitted into evidence any testimony or exhibits relative to the Grievant's employment history prior to March 14, 2000.

The Grievant's current misconduct and his extensive record of discipline demonstrate that he is not remediable. The Council

has provided the Grievant with several opportunities to "change his ways" in the workplace. The Council has provided the Grievant with second chances and Last Chance Agreements in the past, but the Grievant has not availed himself of those gracious offers to remain employed. The Grievant's prior work record aggravates his current misconduct and supports the Council's decision regarding the discharge penalty.

Given the Council's obligations to provide employees with a work environment that is safe and free of violence, harassment and intimidation, the Grievant's egregious conduct in 2005 and the Grievant's lengthy record of discipline termination was appropriate. The Council should not be required to continue the Grievant's employment and face the strong likelihood that he will again engage in similar conduct in the future.

While only one co-worker appears to be in support of the Grievant (Union Exhibit #1), the vast majority of the Grievant's co-workers in the Metropolitan Council Environmental Services have the right to expect the Council to put an end to the Grievant's inappropriate behavior in the workplace.

In the final analysis, the Employer's actions in applying the terms and conditions of the 2005 Last Chance Agreement to the Grievant's

conduct in 2005 were not arbitrary, capricious or discriminatory. The Employer's actions were fair and equitable as applied to the terms and conditions of the 2005 Last Chance Agreement. The Grievant is not entitled to another chance.

AWARD

Based upon the foregoing and the entire record, the grievance and all requested remedies are hereby denied.

Richard John Miller

Dated April 24, 2006, at Maple Grove, Minnesota.